STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2006
v	No. 264138 Missaukee Circuit Court
RONALD TIMOTHY BEAN, Defendant-Appellant.	LC Nos. 04-001863-FH 04-001864-FH 04-001865-FH

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of one count of larceny by conversion for an amount more than $1,000 but less than $20,000, MCL 750.356(3)(a), two counts of larceny by conversion for an amount of $20,000 or more, MCL 750.356(2)(a), and three counts of common-law fraud, MCL 750.280. Defendant was sentenced: (1) in LC No. 04-001863-FH, to 330 days in jail for larceny by conversion for an amount more than $1,000 but less than $20,000, and 330 days in jail for common-law fraud; (2) in LC No. 04-001864-FH, to 23 months to 10 years' imprisonment for larceny by conversion for an amount of $20,000 or more, and 365 days in jail for common-law fraud; and (3) in LC No. 04-001865-FH, to 23 months to 10 years' imprisonment for larceny by conversion for an amount of $20,000 or more, and 365 days in jail for common-law fraud. We affirm.

Defendant asserts that he is entitled to a new trial based on the improper admission of MRE 404(b) evidence and the trial court's refusal to sever the three complainants' claims into separate trials. Defendant also contends that his convictions for both larceny by conversion and common-law fraud violate federal and state constitutional provisions prohibiting double jeopardy.

The complainants in this case are Glenn Ward, Robin Jackson, and Michelle Cottrell. Each gave defendant substantial amounts of monies for investment. Defendant's MRE 404(b) argument is based on testimony by Cory Clark and Chad VanHaitsma regarding monies that they also gave to defendant for investment and representations made to them by defendant regarding his financial success, which the prosecutor offered to demonstrate the existence of a common scheme or plan and intent to defraud. MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) "is a rule of legal relevance, defined as a rule limiting the use of evidence that is logically relevant." *People v VanderVliet*, 444 Mich 52, 61-62; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994). The *VanderVliet* Court articulated the test for admissibility of evidence of prior bad acts to include: (1) the prosecutor must offer the evidence to prove something other a than bad character or "propensity for criminality" theory; (2) the evidence must be relevant under MRE 402; and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *Id.* at 74-75; see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Upon request, the evidence should be accompanied by a proper limiting instruction. *Id.*

A review of the testimony provided by Clark and VanHaitsma demonstrates that it was offered for a proper purpose. Their testimony revealed a pattern of behavior that closely correlated with the actions of defendant with the instant complainants to induce their provision of monies to defendant for investment. "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin* (*After Remand*), 463 Mich 43, 63; 614 NW2d 888 (2000). Here, the other acts evidence was "sufficiently similar" to the charged misconduct to support a finding of relevance.

Defendant failed to establish that the disputed evidence should have been excluded under the balance test of MRE 403. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the trier of fact. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). The determination of whether the probative value of evidence is substantially outweighed by its prejudicial effect is "best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony." *People v Magyar*, 250 Mich App 408, 415-416; 648 NW2d 215 (2002). While the other acts evidence in issue may be viewed as prejudicial, the record does not establish that it was given preemptive or undue weight and, thus, cannot be characterized as unfair. See *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). In addition, the court properly instructed the jury on the limited use of the other acts evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, defendant fails to establish error based on the inclusion of the other acts evidence.

In addressing defendant's severance argument, it is noteworthy that defendant's original counsel requested and stipulated to joinder of the three complainants' claims. After defendant's initial counsel withdrew, his next attorney moved to sever the claims, which the trial court denied. Defendant now argues that the court's refusal to grant the severance deprived him of his right to a fair trial.

At the time of defendant's trial, MCR 6.120 read in pertinent part as follows:

> (B) On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan.
>
> (C) On the motion of either party, except as to offenses severed under subrule (B), the court may join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges of the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. Subject to an objection by either party, the court may sever offenses on its own initiative.[1]

The offenses at issue are related under the definition of MCR 6.120(B)(1). Indeed, both subrules, MCR 6.120(B) and (C), demonstrate the propriety of joinder in this case. Defendant argues he is entitled to a new trial because the complaints should have been severed due to important differences in the cases. However, any differences between the cases were insubstantial and did not increase the potential for confusion. Accordingly, the trial court did not err in denying defendant's motion to sever.

Finally, defendant contends his convictions for both common-law fraud and larceny by conversion violated the prohibition against double jeopardy. Because this issue was not properly preserved, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d (1999).

"The United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004), citing US Const, Am V; Const 1963, art 1, § 15. Defendant argues that the double jeopardy prohibition is violated when a defendant is found guilty of multiple offenses arising out of the same transaction and, therefore, his convictions for both common-law fraud and larceny by conversion are invalid.

[1] MCR 6.120 was subsequently amended, effective January 1, 2006.

MCL 750.280 states: "Gross frauds and cheats at common law-Any person who shall be convicted of any gross fraud or cheat at common law, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years or by a fine of not more than 5,000 dollars." While the statute does not contain a definition of "gross frauds and cheats," prior case law has defined these terms in accordance with their dictionary meanings as follows: "Fraud is . . . [a] knowing misrepresentation of the truth of concealment of a material fact to induce another to act to his or her detriment. Cheat is [to] defraud; to practice deception. Gross is defined as flagrant and extreme." *People v Dewald*, 267 Mich App 365, 383; 705 NW2d 167 (2005) (internal quotation marks and citations omitted). The elements of larceny by conversion include:

> (1) the property at issue must have some value, (2) the property belonged to someone other than the defendant, (3) someone delivered the property to the defendant, irrespective of whether that delivery was by legal or illegal means, (4) the defendant embezzled, converted to his own use, or hid the property with the intent to embezzle or fraudulently use it, and (5) at the time the property was embezzled, converted, or hidden, the defendant intended to defraud or cheat the owner permanently of that property. [*People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001) (quotation marks and citations omitted).]

The only point of commonality between the two offenses is the intent to defraud. However, the intent to defraud in larceny by conversion can be formed at a point after the property is transferred. In other words, common-law fraud focuses on the transfer whereas larceny by conversion focuses on what was done with the property post-transfer. *Mason, supra* at 72. Larceny by conversion contains elements not elucidated or contemplated in common-law fraud, and the offenses are not part of a hierarchy in which the penalty is increased due to aggravating conduct. *People v Meshell*, 265 Mich App 616, 630; 697 NW2d 754 (2005). As such, defendant's convictions do not constitute multiple punishments in violation of double jeopardy.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot